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12/13/04

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FROM:

Barbara Barnard

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(INCLUDING COVER SHEET)

RE:

Revised -- ORC's Comments

MESSAGE:

for JWD proposed rule changes

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December 13, 2004

RE: DOCKET NO. 2004-01-01
RIN 3037-AA00

Ladies & Gentlemen:

ORC Industries, Inc. ("ORC") is a tax-exempt organization based in La Crosse, Wisconsin, whose mission is to provide opportunities to workers with disabilities for social growth and provide them an educational, recreational and work experience at the community level. ORC has been working to help workers with disabilities for over 37 years. Over 700 people are now employed in ORC's five plants; three in Wisconsin and two in Texas. ORC's business is unique- it has a dual focus on providing critical social services to its employees with disabilities as well as serving its consumers' business needs. Such institutions must have leadership that can strike the right balance on these two separate missions and to achieve success in both. ORC's success in these two arenas is clear, as demonstrated by their business achievements as well as the continuing honors it has won from national agencies associated with individuals with disabilities, from the communities where it is located, and from the families of its employees. ORC is committed to continuing its work and fulfilling its charitable mission, and is concerned that the regulations being proposed by the President's Committee for Purchase From People Who Are Blind or Severely Disabled ("Committee") will have a negative impact on its ability to accomplish these goals.

In response to the regulations being proposed by the Committee, ORC offers the following comments for the Committee's consideration:

1. **Is there a need for this regulation?** As a tax-exempt organization under Internal Revenue Code sec. 501(c)(3), ORC is required, on an annual basis, to file a Return of Organization Exempt from Income Tax (IRS Form 990) with the Internal Revenue Service ("IRS"). ORC is also required to provide the Attorney General for the State of Wisconsin with a copy of its Form 990. This informational return filed with the IRS and the Attorney General's office, provides detailed financial information regarding the operations of ORC, and is available for inspection by the general public (in fact, the returns can be accessed on several internet sites for little or no charge). Also included on the return are the names of every officer, director or key employee of the organization, along with detail regarding their compensation and benefits

received. ORC is also required to disclose relationships or transactions entered into with any related parties, and the terms of these agreements.

On an annual basis, the IRS is therefore provided detailed information regarding the operations of organizations like ORC. If the IRS determines that an organization has engaged in conduct in violation of its charitable purpose, or in violation of the strict rules applied to the operation of tax-exempt organizations, it can impose penalties on both the organization and the individuals involved. If justified, the IRS can revoke the organization's tax-exempt status. It is important to stress that, as part of its regulation of tax-exempt organizations, the IRS monitors all of the following issues:

- The reasonableness of directors' and officers' compensation
- Satisfaction of public disclosure requirements
- The fairness of transactions with related parties
- Diversity of the organization's board

Because the regulations being proposed by the Committee are focused on these very same areas of operations within CRPs, they represent a redundant set of regulations to those issued and already enforced by the IRS, and therefore serve no purpose other than to complicate and confuse the market. The IRS has been delegated the responsibility of regulating organizations including CRPs, and the Committee should leave this job to the government agency that has the expertise, authority and experience to handle this job, the IRS.

2. Authority to regulate internal management. Whereas ORC understands the Committee's concerns regarding the operations of CRPs that bid for contracts, it questions whether the Committee has the authority to regulate the internal management of such organizations under the Javits-Wagner-O'Day Act ("JWOD Act"). It is ORC's belief that the Committee was not given such authority because another governmental agency, namely the IRS, already effectively regulates this area.

3. Sarbanes-Oxley Act of 2002. When the Sarbanes-Oxley Act ("SOX") was signed into law on July 30, 2002, it represented a material change in the way public companies were required to run their business. By its terms, SOX was not applicable to privately-held companies, and those companies were left to evaluate what, if any, provisions of SOX they would adopt in the operation of their business. A few of the best practices of SOX have trickled down to private companies like ORC, which adopted the best practices of SOX over a year ago.

The Committee is now attempting to require private companies (i.e., CRPs) to specifically adopt and implement segments of SOX even though SOX specifically excluded private companies from its reach. The Committee should not unilaterally alter the way private companies do business by forcing them to implement segments of SOX where Congress has determined such companies should not be subject to the burdens of such regulations. The determination of what parts of SOX should be adopted should remain a decision made by CRP.

4. **Impact on smaller CRPs.** In reviewing the certification requirements being proposed by the Committee in the proposed regulations, we determined that ORC has already met and exceeded the proposed standards. ORC is, however, a larger organization with the resources required to satisfy the standards and comply with the governance requirements of the proposed regulations. Smaller CRPs, however, may not have the resources to satisfy all of the burdensome requirements that are being proposed by the Committee. For example, the Committee's proposed rules regarding board independence does not account for the difficulty that smaller exempt organizations have in recruiting volunteer board members.

Since ORC started as a small organization 37 years ago, it has grown to employ more than 700 individuals. The road to ORC's success was not easy, but through the efforts of its officers, directors and employees, ORC succeeded in its mission and is now doing more to serve the community than was ever expected by the founders of the organization. ORC is a success story, but ORC is still attuned to the difficulties that fledgling exempt organizations face in pursuing their charitable goals. The regulations being proposed by the Committee introduce new barriers for these organizations that could prevent them being able to succeed in their charitable missions. If these smaller CRPs are able to satisfy the formidable requirements to qualify as charitable organization under IRS sec. 501(c)(3), the Committee should not create new roadblocks to prevent them from accomplishing their missions. The burdensome operational requirements proposed by the Committee, we feel, will do just that.

5. **Incorrect comparable information.** The regulations being proposed provide that compensation of CRP executives be compared to government employees to determine whether such compensation is unreasonable. This comparison is without basis, and ignores the realities of the markets in which CRPs operate.

There are distinct and material differences in the job duties of government senior executive series "SES" employees and those of CRP executives. A CRP executive, although working for a tax-exempt organization, is required to fulfill all the job duties typically associated with being a Chief Executive Officer ("CEO") of a private for-profit corporation. He or she is required to oversee the operations of the company; manage relationships with suppliers, customers, creditors/banks, the community and local governmental authorities; oversee the preparation of tax returns and financial statements; and manage human resources, marketing and other corporate initiatives to ensure the CRP succeeds as a business. All of these job duties are similar to those engaged in by CEOs of for-profit corporations. It could be said that the CRP executive has more responsibility than the CEO of a private for-profit corporation because the CRP executive needs to be versed in all aspects of social services as well as being a good businessperson versed in all aspects of running a manufacturing operation.

The IRS recognizes the critically important role that CRP executives play within their organizations. When evaluating whether an executive of a tax-exempt organization is being paid a reasonable amount of compensation, the IRS compares the compensation paid to the CRP executive with compensation paid to executives of for-profit organizations in similar/comparable businesses. As the IRS recognizes, to use any other comparison, such as the pay of a SES government employees, would ignore the different day-to-day and long-term demands of the CRP executive's role.

Comparisons between SES government employees and CRP executives reveal a number of additional differences, for example in area of retirement benefits. Many CRP executives work for years planning for their organization's future while no planning at all exists for the executive's own future. In my case, I worked for ORC in my current role between 1990 and 2000 without any retirement plan in place. Fortunately, the ORC Board understood this issue and hired an expert in executive compensation to develop a deferred compensation fund to address this decade-long issue and I am now covered under the company's retirement plan with a 401(k) account.

Having such a retirement plan in place, like executives in public service and for profit businesses has allowed executives like me to continue to work at CRPs like ORC doing the work I cherish while having the peace of mind that comes with knowing that my retirement plan, like my employees' plans, are secure.

In the proposed regulations the Committee states that:

The basis for comparing a central nonprofit agencies or nonprofit agencies executive compensation to a federal employee's compensation lies in the fact that the JWOD program is a federal program and the funds obtained through the JWOD program are federal contract funds.


This statement makes no sense. Under this theory, all government contractors would be subject to regulation of their internal management regardless of whether such contractors were tax-exempt organizations or for-profit organizations. In essence, all government contractors would be considered federal employees, which, of course, they are not. If the Committee is concerned that executives of charitable organizations that are bidding on contracts are being paid too much, they should take solace in the fact that the IRS is already regulating these agencies on that exact issue, not issue regulations based on a system of monitoring the activity of government contractors that has never been authorized or used.

Lastly, the compensation limitations being proposed by the Committee will have a dramatic impact on CRPs ability to attract and retain quality executives. Because CRP executives are asked to perform duties similar to those performed by executives of for-profit corporations, CRPs often find themselves competing with for-profit corporations for talented executives to help them succeed in their business. To attract these quality candidates, CRPs are required to offer such executives compensation packages similar to those they may be offered by for-profit corporations. If CRPs are not able to offer compensation packages in-step with the markets in which they operate, they will lose their best executives and will be forced to hire lower-quality executives willing to accept the lower compensation authorized by the Committee. This will relegate CRPs to a second class status in the minds of executive job seekers and will lead to a "brain drain" in some of the best businesses that exist in this country. CRPs, by definition, are charitable organizations that are dedicated to a charitable mission of providing opportunities to workers with disabilities. If there are businesses that we should want our best

executives to work for, CRPs are it. By preventing CRPs from being able to attract top-quality executives, the proposed regulations will irreparably damage CRPs and their ability to best accomplish their mission. This is a wrong result.

In summary, I believe that CRPs should be responsible for ensuring an effective and transparent administration for themselves. The IRS already regulates the activities of CRPs, and, more specifically, the internal management of CRPs that are the subject of the Committee's proposed regulations. Under IRS regulations, CRPs are already required to fully disclose financial information and details regarding the compensation of their executives. All of this information is subject to public inspection. Therefore, the regulations being proposed by the Committee are redundant and unnecessary. The likely impact of such regulations will be to disadvantage existing CRPs and create barriers to the organization of new CRPs. President Bush has called for a better partnership between public and private organizations. These rules are definitely the antitheses of that idea.

ORC INDUSTRIES, INC.

By: 
Barbara Barnard
President